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No. 03-1300

Supreme Court, U.S.
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In The

Supreme Court of the United States

ARTHUR L. ZULICK,

Petitioner,

v.

JENNIFER ANN WISE,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of Pennsylvania

RESPONDENT'S BRIEF IN OPPOSITION

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COUNTER-STATEMENT OF QUESTIONS PRESENTED

Question 1.

Whether the instant Petitioner, a life-long enrolled member of a major political party who for more than two decades had voted in each primary election of that major political party, was deprived of his individual constitutional rights through the enforcement by the court below of the statutory limitation that prevents an individual who contested a primary election and lost that contest from being nominated to the same office by the circulation of nomination papers?

Question 2.

Whether the instant Petitioner is an appropriate party to litigate *pro se* the constitutionality of a state election law limitation on nominations by minor political parties, when the instant Petitioner is a life-long enrolled member of a major political party and when no minor political party attempted either to intervene in the proceeding below or to be heard as *amicus curiae*?

LIST OF PARTIES TO THE PROCEEDING

The parties to the proceeding in the state courts of Pennsylvania were limited to Petitioner Arthur L. Zulick, who was the Respondent-Candidate below, and Respondent Jennifer Ann Wise, who was the Petitioner-Objector below.

In accordance with its usual practice, the Office of the Attorney General of Pennsylvania, although given formal notice of Petitioner Zulick's defense below asserting that the provisions of state law relied on by Respondent Wise violated the Equal Protection Clause, declined to intervene in the state proceeding and filed briefs only as *amicus curiae*. Although named as a Respondent in the instant Petition for a Writ of Certiorari, that Office has declined to participate in this Court, thus leaving to counsel for Respondent Wise the burden of defending the constitutionality of the Pennsylvania statutes.

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JURISDICTION

Respondent agrees that Petitioner Zulick timely petitioned for a writ of certiorari pursuant to 28 U.S.C. § 2101(c) and that this Court has jurisdiction pursuant to 28 U.S.C. § 1257.

COUNTER-STATEMENT OF THE CASE

Petitioner Arthur L. Zulick (herein sometimes "Petitioner" or "Zulick") has been enrolled in the Republican Party since 1979 and had voted in the Republican primary in each year since 1979 up to the time of the hearing in the proceeding below (Stipulation at ¶ 2). In the May 20, 2003 primary election, Zulick contested both the Republican and Democratic nominations for the elective office of Judge of the Court of Common Pleas (43rd Judicial District, Monroe County, Pennsylvania) and lost the Republican primary to a registered Republican and lost the Democratic primary to a registered Democrat, Respondent Jennifer Ann Wise.

Following his primary election defeats, Zulick circulated nomination papers to nominate himself as the candidate of the Reform Party. The Reform Party of Monroe County held the status of a "minor political party" as defined in Section 912.2 of the Pennsylvania Election Code ("Nominations by Minor Political Parties"), added by Act 1986-11, P.L. 29, § 8, 25 P.S. § 2872.2,[1] because a

[1] In this Brief in Opposition, the statutory citations are to the official statutory "Pamphlet Laws," abbreviated as "P.L.," sometimes referred to outside Pennsylvania as "session laws," and to the unofficial

(Continued on following page)

candidate of the Reform Party achieved at least five percent of the vote in Monroe County in the 2002 November election, but the Reform Party does not have registered voters equal to fifteen percent of the total state-wide voter registration. This definition of a minor political party, as is demonstrated *infra* at page 7, was enacted for the benefit of minor political parties because such entities frequently – perhaps generally – achieve ballot line status by obtaining five percent of the vote in a particular district but without having sufficient enrolled members (voters who have registered as members of the minor political party) to circulate nomination petitions and hold a meaningful primary election (Pennsylvania primary elections are "closed," meaning that only voters registered as enrolled members of a party may vote in the primary elections of that party).

Respondent Jennifer Ann Wise, a registered elector of Monroe County and the nominee of the Democratic Party for the office of Judge of the Court of Common Pleas in the November 2003 election, timely filed and served an objection (titled under the state procedure as a "Petition to Set Aside Nomination Paper") to Zulick's candidacy. At the initial hearing in the Commonwealth Court before a single Judge, on August 20, 2003, the pertinent facts were stipulated concerning Zulick's status as an enrolled Republican and Wise's standing as a registered elector and opposing candidate. No evidence was offered concerning

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statutory compilation "Purdon's Pennsylvania Statutes Annotated," abbreviated as "P.S.," because those forms of citation have been used both in the Petition and in the decision below of the Commonwealth Court of Pennsylvania.

the participation or involvement, if any, of the Reform Party in the circulation of Zulick's nomination paper (Hearing transcript at 6) and the Reform Party did not intervene in the proceeding. Zulick contended that the statutory limitation on the candidacy by nomination papers of an individual defeated in the primary election for the same office, Section 951(e)(5) of the Election Code, 25 P.S. § 2911(e)(5), was unconstitutional because the enforcement of that limitation within Allegheny County had been enjoined by a federal district court as to persons who had either won major party nominations or who were seeking those nominations, and that decision had been reaffirmed by the United States Court of Appeals in *Reform Party of Allegheny County v. Allegheny County Department of Elections,* 174 F.3d 305 (3d Cir. 1999) (*en banc*) (sometimes referred to as "*Patriot Party II*").

Following the hearing on August 20th, the Commonwealth Court listed the case for argument on September 9, 2003 before a three-Judge panel. By an Opinion and Order filed and entered September 19, 2003, the Commonwealth Court sustained the constitutionality of section 951(e)(5), 25 P.S. § 2911(e)(5), as applied to a so-called "sore loser" candidate such as Zulick, who had been defeated for the same nomination in the primary election, and expressly reserved for future consideration ("we decline to address") whether "a minor party can nominate a 'happy winner' of a major party primary where cross-filing is permitted as was the issue in the 3rd Circuit's decision in *Patriot Party II.*" Opinion below, Petitioner's Appendix at A-26 n.13.

From the Order granting the petition to set aside his nomination paper, Zulick filed a timely appeal to the Supreme Court of Pennsylvania. After receiving briefs on

an expedited schedule, the Supreme Court of Pennsylvania unanimously affirmed the Order of the Commonwealth Court in a *per curiam* Order filed October 28, 2003. Petitioner's Appendix at B-1.

REASONS THAT THE PETITION SHOULD BE DENIED

A. Petitioner Zulick, who is a life-long enrolled member of one of the major political parties, is not an appropriate litigant to test in this Court the constitutionality of the application of the Pennsylvania Election Code to minor political parties.

1. The stipulated facts established in the court below that Petitioner Zulick was a life-long registered Republican who had voted in each annual Republican Primary Election since 1979.

The evidence received at the hearing in the Commonwealth Court established that Petitioner Zulick was not only a life-long Republican but also a Republican who had never failed to vote in his party's annual primary election. No evidence was offered that Zulick had any commitment to or interest in the political positions espoused by the Reform Party or that he intended to enroll as a member of the Reform Party.

2. No evidence was presented below that Petitioner Zulick ever intends in the future to seek the nomination of any minor political party.

In the hearing in the Commonwealth Court there was no evidence presented to show that Zulick had any intention to seek the nomination of a minor political party, other than in the election cycle of 2003.

3. Although Petitioner Zulick now asserts that he is litigating in this Court individually and on behalf of the Reform Party, a minor political party, the Reform Party neither attempted to intervene as a party in the proceeding below nor sought to be heard as *amicus curiae*.

Although Zulick attempts in his statement of the "Question Presented" to appear to be litigating to vindicate the rights of the Reform Party, it is notable that the Reform Party neither attempted to intervene as a party in the proceeding below nor sought to be heard as *amicus curiae*. Only after the Commonwealth Court had denied an application for a stay of its Order directing that Zulick's name not be printed on the ballots did the Reform Party of Monroe County bring an action in the United States District Court for the Middle District of Pennsylvania against the Pennsylvania officials responsible for elections and seeking an injunction to prevent Zulick's name from being omitted from the ballots.[2] But the Reform Party

[2] The action was captioned *The Reform Party of Monroe County v. Pedro A. Cortes, Secretary, Manna Accurti, Commissioner and*

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abandoned that action following the District Court's dismissal pursuant to the *Rooker-Feldman* doctrine[3] without taking an appeal to the United States Court of Appeals for the Third Circuit. Under these circumstances, this Court should await a case brought by a minor political party, or at least brought by a professed adherent of a minor political party, before revisiting the constitutional issues posed by "sore loser" restrictions preventing seriatim candidacies.

Commonwealth of Pennsylvania Department of State, No. 3: CV 03-1799, filed October 9, 2003.

[3] *Rooker v. Fidelity Trust Co.*, 263 U.S. 413 (1923), and *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462 (1983).

B. The Pennsylvania Legislature's different treatment in the state Election Code of nomination of candidates by direct primary election, on the one hand, and the nomination of candidates by the signing of nomination papers, on the other hand, does not constitute a denial of equal protection to candidates of minor political parties.

1. The Pennsylvania Legislature has determined that if the selection of candidates is by a direct primary election, there is less need to impose limitations on the eligibility of candidates because the secret vote cast in the primary election will tend to prevent individuals from manipulating the nomination process for personal advantage, but if the selection of candidates is solely by the signing of nomination papers, there is a need to impose limitations to prevent such manipulation.

As recognized by the Commonwealth Court in a carefully-considered analysis of the precedents of this Court in cases involving state election statutes,

> [T]here are obvious differences in kind between the needs and potentials of a political party with historically established broad support, on the one hand, and a new or small political organization on the other. [A State is not] guilty of invidious discrimination in recognizing these differences and providing different routes to the printed ballot. Sometimes the grossest discrimination can lie in treating things that are different as though they were exactly alike . . . .

Opinion at A-22-23, quoting from *American Party of Texas v. White*, 415 U.S. 767, 782 n.13 (1974), in turn quoting from *Jenness v. Fortson*, 403 U.S. 431, 441-42 (1971).

Because of those "differences in kind," the structure of the Pennsylvania Election Code distinguishes between the nomination of candidates by primary elections and the nomination of candidates by nomination papers, without a primary election.

This structure of the Pennsylvania Election Code reflects the belief that the nomination of candidates by an actual secret ballot of party members in a primary election is a method that can be trusted to result in a choice of candidates that cannot easily be manipulated by party leaders or by prominent individuals who may desire to achieve selfish individual objectives.

Conversely, the structure of the Election Code reflects the belief that when the nomination of candidates does not involve an actual secret ballot case in a primary election, there should be limitations to prevent manipulation of the nomination process. One such perceived manipulation was the independent political body nomination of Richard S. Caliguiri as candidate for Mayor of the City of Pittsburgh in the general election of November 8, 1977. Opponents of Mayor Caliguiri, who had succeeded to the office by virtue of his position as president of city council, unsuccessfully sought to remove him from the ballot on various grounds, including the allegation that because he had agreed at the time he accepted the presidency of council that he would not run for mayor in the ensuing primary, he should be estopped from running on an independent ticket in the next ensuing general election. *In re Caliguiri*, 4 D.&C. 3d

1 (C.P. Allegheny 1977). In declining to remove Mayor Caliguiri from the November ballot the court stated:

> This court cannot legislate. The legislature might also have enacted a disaffiliation statue forbidding a candidate who has been a registered member of a political party for one year from running as an independent. There is no such statute in Pennsylvania and, of course, this court may not engraft such a qualification of the election laws. In short, there is no legal obstacle to Caliguiri's candidacy.

4 D.&C. 3d at 21-22.

The Legislature reacted to the controversy surrounding Mayor Caliguiri's nomination (and subsequent election) by enacting the disaffiliation limitation, Section 951.1 of the Election Code, added by the Act of July 12, 1980, P.L. 649, 25 P.S. § 2911(e)(6) and (7), and § 2911.1 ("Limitations on eligibility of candidates").

The limitation at issue in the instant case can be traced back to the original Election Code of June 3, 1937, P.L. 1333, § 951(e)(5) ("that his name has not been presented as a candidate by nomination petitions for the same office to be voted for at the ensuing primary election, nor has he been nominated by any other nomination papers filed for the same office"), 25 P.S. § 2911(e)(5). The language of Section 951 has been amended twice since the 1980 addition of the disaffiliation requirement, including by Act 1998-18, P.L. 72, which reenacted sub-section (e) by deleting certain language but leaving intact the text of sub-section (e)(5).

2. The Pennsylvania legislative determination in 1986 that minor political parties should select candidates by nomination papers, rather than by primary elections, was explicitly intended to benefit minor political parties, which were unable to conduct primary elections following an earlier increase in the number of signatures required for nomination petitions.

As recognized by The Commonwealth Court, the creation of the category of "minor political parties" by the Legislature in Act 1986-11, approved February 19, 1986, was intended to benefit minor political parties by resolving a serious constitutional issue.

The first reported decision dealing with that constitutional issue was *Fraenzl v. Secretary of the Commonwealth*, 83 Pa. Cmwlth. 539, 478 A.2d 903 (1984), involving the Socialist Workers Party, which had achieved the percentage of the vote necessary to be on the ballot as a "political party," but which had only three registered members within the political district. Because the party had only three registered voters within the district, it was impossible for a candidate to circulate a nomination petition because the party had fewer members than the minimum number required to sign a nomination petition. Judge Doyle of the Commonwealth Court characterized this situation as "a 'catch 22' which cannot have been intended by the legislature." 478 A.2d at 906. The Commonwealth Court solved the constitutional impasse by ordering that the Socialist Workers Party be permitted to nominate candidates through the circulation of nomination papers.

The "Catch 22" situation adjudicated in *Fraenzl* became even worse when the Legislature, reacting to perceptions of "ballot clutter" such as 299 candidates on the 1983 Philadelphia ballot for Judge of the Court of Common Pleas (39 to be nominated), increased the nomination petition signature requirements by Act 190 of 1984, P.L. 968, 25 P.S. § 2872.1. The Consumer Party and its leaders, which had been able for several years to satisfy the earlier nomination petition requirements, brought suit in the federal district court. The plaintiffs proved that the increased signature requirement in Act 190, although not intended to affect the Consumer Party, had the effect of making it "impossible" for the Consumer Party "to obtain enough signatures to put its candidates on the primary ballot." *Consumer Party v. Davis*, 606 F. Supp. 1008, 1013 (E.D. Pa. 1985). The District Court denied an injunction invalidating Act 190 but ordered that the Consumer Party be permitted on the November ballot through the nomination papers route. The Court of Appeals reversed and remanded for further consideration of an appropriate remedy. *Consumer Party v. Davis*, 778 F.2d 140 (3d Cir. 1985).

On remand, the Consumer Party pressed the District Court for relief prior to the start of the nomination petition circulation period in February 1986. Simultaneously, the Legislative leadership sought to enact legislation creating the category of "minor political party" to moot the Constitutional challenge to Act 190.

The Legislative Journal – House for February 12, 1986 at 232-34 shows that the leaders of both parties were concerned that "there appears to be a Federal judge who may perhaps rule unless we pass legislation" and "there

may well be a ruling over the weekend" (page 232, remarks of the majority leader, Mr. Manderino).

Although by using some bipartisan parliamentary maneuvers the Legislature was able to enact legislation for the benefit of minor political parties in record time on February 12th (a conference report was presented and approved two pages later at page 234), the United States District Court acted that same day to invalidate Act 190. *Consumer Party v. Davis*, 633 F. Supp. 877 (E.D. Pa. 1986).

Following the approval on February 19th by the Governor of House Bill 1000, as amended by the February 12th conference report, that federal district court decision became moot because the constitutional issue had been resolved by the creation of the category of "minor political parties." Act 1986-11, P.L. 29, § 8, adding Election Code § 912.2 ("Nominations by Minor Political Parties"), 25 P.S. § 2872.2. The key language of the new section states:

> (a) Notwithstanding any other provision in this act to the contrary, minor political parties shall nominate all of their candidates for the offices to be filled at the ensuing November election pursuant to section 903 in accordance with the requirements of section 951, other than subsection (e)(6) and (7) thereof, and section 954, and shall obtain the required signatures during the same time frame available to political bodies. Minor political parties shall be subject to the provisions of this act applicable to political parties with respect to special elections, voter registration forms, substituted nominations and all other purposes except as otherwise expressly provided in this section. "Minor political party" shall mean a political party as defined in section 801(a) or (b) whose State-wide registration is less than

fifteen per centum of the combined State-wide registration for all State-wide political parties as of the close of the registration period immediately preceding the most recent November election.

3. In benefiting the minor political parties by permitting their selection of candidates through the circulation of nomination papers, the Legislature also relieved minor political parties of some of the existing limitations on candidates selected by nomination papers, but continued the "sore loser" prohibition that was held to prevent the nomination of the Petitioner.

In enacting Section 912.2, creating the category of "minor political parties," the Legislature relieved "minor political parties" of the disaffiliation limitation enacted following the Mayor Caliguiri controversy, subsections (e)(6) and (7) of Section 951, but retained the limitation in subsection (e)(5) of Section 951 that had been enacted as part of the original Election Code of June 3, 1937, P.L. 1333.

C. The courts of Pennsylvania and the federal courts have repeatedly upheld the statutory limitations on selection of candidates by nomination papers.

The distinction made in the Pennsylvania Election Code between the nomination procedures for political parties and the nomination procedures under Section 951, which are now applicable to minor political parties, have been subjected to repeated attack and the provisions now

at issue have been upheld. In *Williams v. Tucker*, 382 F. Supp. 381, 387 (M.D. Pa. 1974), a three-Judge District Court sustained the constitutionality of an interpretation of the Election Code that would prevent a losing primary candidate from running as a independent candidate. The court in *Williams v. Tucker*, like the Commonwealth Court in *Substitute Nomination Certification of Moran*, 739 A.2d 1168 (Pa. Cmwlth. 1999), relied on this Court's opinion in *Storer v. Brown*, 415 U.S. 724, 734-35 (1974). See *Salera v. Tucker*, 399 F. Supp. 1258, 1268 (E.D. Pa. 1975), *aff'd mem.*, 424 U.S. 959 (1976) (explaining earlier holding in *Williams v. Tucker*).

The decision of *In re Owens*, 436 A.2d 260 (Pa. Cmwlth. 1981), adjudicated a "broad-based attack on the constitutionality" of the disaffiliation requirement in subsection (e)(6) as applied to an individual seeking to file nomination papers for the office of school director. The Commonwealth Court concluded as follows, in an opinion by Judge MacPhail:

> Finally, Appellant makes a broad-based attack on the constitutionality of the mandated affidavit [as required by Section 951(e)(6) of the Election Code, 25 P.S. § 2911(e)(6)]. Our review of the legislation makes it abundantly clear to us that the affidavit denies equal protection to no one nor does it inhibit a citizen's free choice of political party affiliation, deny due process to eligible candidates or infringe upon their civil rights. Rather, we believe the amendment to the Election Code which requires the affidavit was a necessary and laudable effort on the part of the legislature to prevent disappointed candidates from forming their own political conclaves to get their names on a ballot *by circumventing the*

> *provisions of the Election Code which provide for an orderly political process through the operation of the political party system* but which still preserves the rights of those who may prefer to have no political affiliation.

436 A.2d at 261-62 (emphasis added).

In *Baronett v. Tucker*, 365 A.2d 179 (Pa. Cmwlth. 1976) (*en banc*), the Commonwealth Court considered a disingenuous argument that the intent of subsection (e)(5) could be avoided because the language refers to someone who has filed a nomination petition "for the ensuing primary" rather than "for the preceding primary."

> Baronett argues that this section does not bar the filing of nomination papers by a candidate defeated in the preceding primary and that, therefore, his papers should have been accepted. We do not agree.

365 A.2d at 180. The Commonwealth Court noted that the change in filing dates required by the decision in *Salera v. Tucker*, *supra*, had changed the time sequence, but that the legislative intent was nonetheless clear:

> It is clear to us that the purposes for the section of the Code in which the term here concerned appears are to require a candidate to choose between the primary route and the nomination route to the general election ballot and *to prevent a losing primary candidate from filing nomination papers. Williams v. Tucker*, 382 F. Supp. 381 (M.D. Pa. 1974). It is equally clear that a court, guided by the presumption that the legislature does not intend a result that is unreasonable, should give all laws a sensible construction, should ascertain and give effect to the intention

> of the legislature and when necessary, may interpolate additional words.

365 A. 2d at 181 (emphasis added).

D. The constitutional decisions of this Court permit a State to make rational distinctions between selection of candidates by primary election and selection of candidates by nomination papers.

No recent decision of this Court comes close to a holding that would require a State to have exactly uniform provisions for the nomination of candidates through secret ballot primary elections and the nomination of candidates by nomination papers with no primary election process. Certainly there is no holding in *Timmons v. Twin Cities Area New Party*, 520 U.S. 351 (1997), that requires such uniformity of treatment. The Court of Appeals in *Patriot Party II*, formally styled as *Reform Party of Allegheny County v. Allegheny County Department of Elections*, 174 F.3d 305, 312 (1999), quotes one phrase from *Timmons* as if that one phrase represents an equal protection holding of this Court:

> Regulations imposing severe burdens on plaintiffs' rights must be narrowly tailored and advance a compelling state interest. Lesser burdens, however, trigger less exacting review, and a State's "'important regulatory interests'" will usually be enough to justify "'reasonable, *nondiscriminatory* restrictions.'" *Timmons*, [520 U.S. at 358,] 117 S.Ct. at 1370 (emphasis added). Thus, even though the Court held that the burdens posed by fusion bans on parties and voters are not severe, the Court still maintained a requirement that the restrictions be reasonable

> and nondiscriminatory. Because the Pennsylvania law permits fusion by major parties, but prohibits fusion by minor parties, it is, on its face, discriminatory.

174 F.3d at 312-13 (footnote omitted). Although the Court of Appeals seemed to treat the phrase quoted from *Timmons* as if that phrase represents an equal protection holding of the *Timmons* majority, the quoted phrase in context is merely a recital of the standard of scrutiny as applied in an earlier decision that reversed the Ninth Circuit and upheld Hawaii's prohibition on write-in voting. Here is the phrase as it appears in the *Timmons* opinion:

> Regulations imposing severe burdens on plaintiff's rights must be narrowly tailored and advance a compelling state interest. Lesser burdens, however, trigger less exacting review, and a State's "'important regulatory interests'" will usually be enough to justify "'reasonable nondiscriminatory restrictions.'" *Burdick, supra,* at 434 (quoting *Anderson, supra*, at 788); *Norman, supra*, at 288-289 (requiring "corresponding interest sufficiently weighty to justify the limitation"). No bright line separates permissible election-related regulation from unconstitutional infringements on First Amendment freedoms. *Storer, supra*, at 730 ("[N]o litmus paper test . . . separat[es] those restrictions that are valid from those that are invidious. . . . The rule is not self-executing and is no substitute for the hard judgments that must be made").

520 U.S. at 358-59. *Burdick* refers to *Burdick v. Takushi*, 504 U.S. 428 (1992) (sustaining Hawaii's prohibition on write-in voting). Nothing in the *Burdick* decision supports an equal-protection challenge to Pennsylvania's Election

Code. Quite the contrary, the *Burdick* majority expressly approves a "sore loser" rationale for Hawaii's prohibition on write-in voting:

> It [Hawaii's system] could also be frustrated at the general election by permitting write-in votes for a loser in a party primary or for an independent who had failed to get sufficient votes to make the general election ballot. The State has a legitimate interest in preventing these sorts of maneuvers, and the write-in voting ban is a reasonable way of accomplishing this goal.

504 U.S. at 440.

Moreover, the Court of Appeals in *Patriot Party II (Reform Party)* fails to recognize that the trend of this Court's decisions in the last decade has been to reverse intermediate federal decisions that have invalidated state election laws. See *Timmons, supra,* 520 U.S. at 359-63.

Finally, the Court of Appeals in *Patriot Party II (Reform Party)* attempts to limit the effect of the two pages in the *Timmons* opinion in which the Supreme Court majority elaborates upon the extent to which "the States' interest permits them to enact reasonable election regulations that may, in practice, favor the traditional two-party system . . . and may temper the destabilizing effect of party splintering and excessive factionalism." *Timmons*, 520 U.S. at 367-68. This Court should follow that portion of the *Timmons* opinion.

E. The Court of Appeals decision relied on by Petitioner is neither binding nor persuasive and the Court of Appeals dealt with a different and distinguishable issue not presented by the instant case and expressly reserved for future determination by the decision below.

The *Timmons* decision in 1997 was the occasion for the *en banc* rehearing that resulted in the decision in *Patriot Party II*. As stated in the opening paragraph of *Patriot Party II,* 174 F.3d at 307:

> In this *en banc* review, we must determine to what extent our earlier decision in *Patriot Party of Allegheny Court v. Allegheny County Dep't of Elections*, 95 F.3d 253 (3d Cir. 1996) (*Patriot Party I*) remains good law in the wake of the Supreme Court's decision in *Timmons v. Twin Cities Area New Party*, 520 U.S. 351 . . . (1997). In *Patriot Party I*, we held that the Pennsylvania statutes at issue, which in certain local elections bar cross-nomination of candidates by minor parties, but not by major parties, violated the Patriot Party's right to freedom of association under the First and Fourteenth Amendments, as well as its right to equal protection of the laws under the Fourteenth Amendment. We now conclude that the decision in *Timmons*, in upholding a Minnesota "anti-fusion" statute against a First Amendment attack, does not undercut our equal protection analysis in *Patriot Party I*. We will, therefore, reaffirm our holding that the Pennsylvania statutes here, as applied to the local elections in question, violate the Patriot Party's right to equal protection of the laws.

In a footnote, the Court explained that the name of the plaintiff had been changed from Patriot Party of Allegheny

County to Reform Party of Allegheny County but that in "this opinion, we will continue to use the former appellation." 174 F.3d at 307 n.2.

As the quotation *supra* from the opening paragraph of *Patriot Party II* indicates, the issue in both *Patriot Party* decisions was the constitutionality of Pennsylvania's limitations on so-called "fusion" candidacies, in which one party seeks to place on the ballot under its label the name of a candidate who has already been nominated by another party. The decision of the Supreme Court of the United States in the *Timmons* case undermined entirely the *Patriot Party I* holding based on the First Amendment, 95 F.3d at 257-68, but in *Patriot Party II* the *en banc* decision reaffirmed an alternative holding based on a denial of equal protection under the Fourteenth Amendment. Although the decision refers to and disapproves a "sore loser" rationale offered in defense of the prohibition on "fusion" candidacies, that rationale was not a major focus of the decision. See 174 F.3d at 316-17.

Consistent with the focus of the Patriot Party decisions on "fusion" candidacies, the relief granted by the District Court, and reaffirmed in *Patriot Party II*, was a declaration of unconstitutionality limited to Allegheny County and enjoining the defendants in that case, who were the Allegheny County Department of Elections and its Director, from enforcing the provisions of Sections 2911(e)(5) and 2963(e) of 25 P.S. See 174 F.3d at 318 n.13, quoting the District Court's Order. No injunction of statewide effect was sought and none was granted.

As previously noted, the decision of the Commonwealth Court in the instant case expressly reserves for

future determination whether the holding in *Patriot Party II* should be the law of Pennsylvania. Opinion at 21 n.13.

F. The Court of Appeals in *Patriot Party II* was never presented with the accurate rationale for the Legislature's rational distinctions between major political parties that select candidates by direct primaries, minor political parties permitted to use nomination papers, and independent bodies that historically have used nomination papers.

Because the Attorney General and the Pennsylvania Department of State did not participate in the litigation resulting in the two *Patriot Party* decisions, the legislative history concerning "minor political parties" and the compelling rationale for the Legislature's rational distinctions between major political parties that select candidates by direct primaries and minor political parties permitted since 1986 to use nomination papers, and independent bodies that historically have used nomination papers. In the hearing below in the Commonwealth Court on August 20th, the Pennsylvania General Counsel's Office explained that neither the Attorney General nor the Pennsylvania Department of State had participated in the *Patriot Party* litigation and that references in the opinions to the position of the "Department" instead referred to the Allegheny County Department of Elections (Hearing Transcript at 46, Gregory Dunlap, Deputy General Counsel: "All the arguments advanced in that case were advanced by the Solicitor of Allegheny County").

CONCLUSION

For the reasons stated, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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